

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

**CITY AND COUNTY OF SAN
FRANCISCO, et al.,**

Petitioners,

v.

**MARK B. HORTON, in his official
capacity as State Registrar of Vital
Statistics, etc., et al.**

Respondents.

) Case No. S168078
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**ANSWER TO SECOND AMENDED PETITION FOR WRIT OF MANDATE;
RETURN TO ORDER TO SHOW CAUSE**


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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208 & 8.490)

There are no interested entities or persons to list in this
certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
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Pursuant to the Court's Order to Show Cause dated November 19, 2008, respondents Mark B. Horton, in his official capacity as State Registrar of Vital Statistics of the State of California and Director of the California Department of Public Health ("CDPH"), and Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the CDPH (collectively, "Respondents"), hereby submit their Return to the Second Amended Petition for Extraordinary Relief filed by Petitioners City and County of San Francisco, et al. (collectively, "Petitioners"). Respondents' Answer to the Petition is set forth below at pages 1 to 8. Respondents' Brief regarding the issues in the Order to Show Cause is set forth at pages 9 to 13.

ANSWER

PRELIMINARY AND JURISDICTIONAL STATEMENT

1. Respondents admit that this paragraph identifies the Petitioners seeking extraordinary relief from this Court. Respondents admit that Mark B. Horton is the State Registrar of Vital Statistics of the State of California and Director of the CDPH, that Linette Scott is the Deputy Director of Health, Information & Strategic Planning for the CDPH, and that Edmund G. Brown Jr. is the Attorney General for the State of California.

2. Respondents deny the allegations of paragraph 2 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

3. Respondents admit that the exercise of original jurisdiction by this Court is appropriate in this case.

4. Respondents lack information whether Petitioners have no other plain, speedy or adequate remedy at law, and deny on that basis.

THE PARTIES

5. Respondents admit that the City and County of San Francisco is a charter city and county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 5, and deny those allegations on that basis.

6. Respondents admit that the County of Santa Clara is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 6, and deny those allegations on that basis.

7. Respondents admit that the County of Los Angeles is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the

remaining allegations of paragraph 7, and deny those allegations on that basis.

8. Respondents admit that the County of Alameda is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 8, and deny those allegations on that basis.

9. Respondents admit that the County of Marin is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 9, and deny those allegations on that basis.

10. Respondents admit that the County of San Mateo is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 10, and deny those allegations on that basis.

11. Respondents admit that the County of Santa Cruz is a charter county organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 11, and deny those allegations on that basis.

12. Respondents admit that the City of Los Angeles is a charter city organized and existing under the Constitution and laws of the State of

California. Respondents lack information regarding the remaining allegations of paragraph 12, and deny those allegations on that basis.

13. Respondents admit that the City of Fremont is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 13, and deny those allegations on that basis.

14. Respondents admit that the City of Laguna Beach is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 14, and deny those allegations on that basis.

15. Respondents admit that the City of Oakland is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 15, and deny those allegations on that basis.

16. Respondents admit that the City of San Diego is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 16, and deny those allegations on that basis.

17. Respondents admit that the City of Santa Cruz is a charter city organized and existing under the Constitution and laws of the State of

California. Respondents lack information regarding the remaining allegations of paragraph 17, and deny those allegations on that basis.

18. Respondents admit that the City of Santa Monica is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 18, and deny those allegations on that basis.

19. Respondents admit that the City of Sebastopol is a charter city organized and existing under the Constitution and laws of the State of California. Respondents lack information regarding the remaining allegations of paragraph 19, and deny those allegations on that basis.

20. Respondents lack information regarding the allegations of paragraph 20, and deny those allegations on that basis.

21. Respondents lack information regarding the allegations of paragraph 21, and deny those allegations on that basis.

22. Respondents lack information regarding the allegations of paragraph 22, and deny those allegations on that basis.

23. Respondents lack information regarding the allegations of paragraph 23, and deny those allegations on that basis.

24. Respondents lack information regarding the allegations of paragraph 24, and deny those allegations on that basis.

25. Respondents lack information regarding the allegations of paragraph 25, and deny those allegations on that basis.

26. Respondents lack information regarding the allegations of paragraph 26, and deny those allegations on that basis.

27. Respondents admit the allegations of paragraph 27.

28. Respondents admit the allegations of paragraph 28.

29. Respondents admit the allegations of paragraph 29.

FACTS

30. Respondents admit that the California Supreme Court issued an opinion in *In Re Marriage Cases* (2008) 43 Cal.4th 757. However, Respondents contend that the opinion speaks for itself, and Respondents deny the remaining allegations in paragraph 30 on that basis.

31. Respondents lack information regarding the allegations of paragraph 31, and deny those allegations on that basis, except that Respondents admit that thousands of gay and lesbian couples married following the decision in *In re Marriage Cases, supra*, and before the passage of Proposition 8.

32. Respondents admit that Proposition 8 qualified for the General Election held on November 4, 2008 and was approved by voters by 52.3% of the voters, and opposed by 47.7% of the voters.

33. Respondents admit that Proposition 8 amended the California Constitution to state that “[o]nly marriage between a man and a woman is valid or recognized in California.” Respondents contend that Proposition 8 speaks for itself, and Respondents deny the remaining allegations in paragraph 33 on that basis. Respondents further deny the allegations of paragraph 33 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.


CLAIMS ASSERTED

34. Respondents deny the allegations of paragraph 34 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

35. Respondents deny the allegations of paragraph 35 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

36. Respondents deny the allegations of paragraph 36 on the basis that they constitute legal argument or state legal conclusions to which no response is now required.

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
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BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

Respondent Mark B. Horton is the State Registrar of Vital Statistics and the Director of the California Department of Public Health ("CDPH"). Respondent Linette Scott is the Deputy Director of Health Information and Strategic Planning for the CDPH. Respondents Horton and Scott are responsible for maintaining standardized marriage forms in compliance with California law. In this capacity, Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws.

As Respondents indicated in their preliminary response to the petition for extraordinary relief, this petition raises questions of statewide importance, implicating not only California's marriage laws but also the initiative process and the Constitution itself. It is appropriate for this Court to address the issues presented to provide uniformity, certainty and finality in this matter. Respondents will comply with this Court's determinations.

In its Order to Show Cause issued on November 19, 2008, this Court directed the parties to brief and argue the following issues:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§ 1-4.)
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
- (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

Because Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws, they take no position on issues (1) and (2) above, and they will comply with the decision of the Court on those issues. However, because issue (3) implicates the certainty and finality of the marriages performed before the adoption of Proposition 8, Respondents contend that Proposition 8 did not invalidate the marriages of same-sex couples performed before Proposition 8 became effective. Respondents address issue (3) in this response.

**ISSUE THREE: IF PROPOSITION 8 IS NOT
UNCONSTITUTIONAL, WHAT IS THE EFFECT, IF ANY, ON THE
MARRIAGES OF SAME-SEX COUPLES PERFORMED BEFORE
THE ADOPTION OF PROPOSITION 8?**

It is well-recognized that laws are presumed to operate prospectively “unless express language or clear and unavoidable implication negatives the presumption.” (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208, quoting *Glavinich v. Commonwealth Land Title Ins. Co.* (1984) 163 Cal.App.3d 263, 272.) Retroactivity is not favored, and laws will not be construed to have retroactive effect unless their language requires such a result. (*Aktar v. Anderson* (1997) 58 Cal.App.4th 1166, 1179, quoting *Bowen v. Georgetown University Hospital* (1988) 488 U.S. 204, 208.)

In the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application. (*Evangelatos v. Superior Court, supra*, 44 Cal.3d at p. 1209.) This principle applies equally to initiative measures approved by the voters. (*Id.* at p.1209 [applying presumption against retroactivity to Proposition 51]; *Rosasco v. Commission on Judicial Performance* (2000) 82 Cal.App.4th 315, 323 [following *Evangelatos*; Proposition 190, which amended state Constitution, not retroactive].) “Initiative measures are

subject to the same rules and canons of statutory construction as ordinary legislative enactments.” (*Rosasco v. Commission on Judicial Performance*, *supra*, 82 Cal.App.4th at p. 323.)


Proposition 8 states: “Only marriage between a man and a woman is valid or recognized in California.” There is no retroactivity clause, and retroactivity should not be inferred from such language. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 843 [ambiguity required statute to be read as unambiguously prospective].)

A retroactive application of Proposition 8 to existing same-sex marriages would overturn the settled expectations of couples who entered into these marriages in reliance on their understanding of the controlling California law at the time. Given the strong presumption against retroactive application, and the need for certainty and finality in these matters, the existing marriages should not be invalidated in the absence of clear direction from the voters. “In the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest.” (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 450.)

CONCLUSION

Respondents have an interest in ensuring the uniformity, certainty and finality of California's marriage laws. Accordingly, they take no position on issues (1) and (2) articulated by this Court in its November 19, 2008 order. However, because issue (3) implicates the certainty and finality of the same-sex marriages performed before the enactment of Proposition 8, Respondents contend that Proposition 8 did not invalidate the marriages of same-sex couples performed before Proposition 8 became effective.

Date: December 19, 2008 MENNEMEIER, GLASSMAN & STROUD LLP
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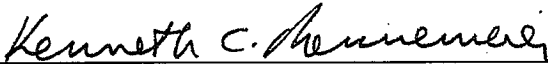

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the "Word Count" feature in my WordPerfect software, this brief contains 2,168 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 19, 2008.

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Case Name: *City and County of San Francisco v. Horton*

Case No: S168078

PROOF OF SERVICE

BY OVERNIGHT MAIL

I hereby declare:

I am a citizen of the United States and employed in Sacramento County, California; I am over the age of eighteen years, and not a party to the within action; my business address is 980 9th Street, Suite 1700, Sacramento, California 95814-2736. On December 19, 2008, I served the within documents:

ANSWER TO SECOND AMENDED PETITION FOR WRIT OF MANDATE; RETURN TO ORDER TO SHOW CAUSE

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and delivering to a Federal Express agent for delivery.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 19, 2008, at Sacramento, California.

Angela Knight
(Type or Print Name)


(Signature)

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CALIFORNIA SUPREME COURT CASE NO. S168078

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